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No. 00-121

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GEORGE DUNCAN, Superintendent,
Great Meadow Correctional Facility,
Petitioner,

v.

SHERMAN WALKER,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENT

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PETITIONER'S QUESTION PRESENTED

Whether a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. §2242(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA") is tolled during the pendency of such an application.

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RESPONDENT'S STATEMENT OF THE CASE

Introduction

One of the several changes Congress made to federal habeas proceedings in the Antiterrorism and Effective Death Penalty Act, (hereinafter "AEDPA"), was the creation of a one year statute of limitations for habeas corpus petitions filed by state prisoners. 28 U.S.C. § 2244.[1] The limitations provision requires habeas petitioners, in most circumstances, to file their federal petitions within one year of the time their state convictions become final on direct review. 28 U.S.C. § 2244(d)(1)(a).[2] The statute provides that the limitations period is tolled during the pendency of "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim". 28 U.S.C. § 2244(d)(2). *See also Artuz v. Bennett,* 121 S.Ct. 361, (2000) This case presents the specific question whether the filing of a petition for a writ of habeas corpus in federal district court is an application for "State post-conviction or other collateral review" thereby tolling the limitations period. That question necessarily involves a determination whether a petition containing unexhausted claims is, nonetheless, an application for habeas corpus relief, satisfying AEDPA's requirement that the application be filed in federal court within one year.

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[1] The AEDPA creates a shorter limitations period for state capital offenders in "opt in" jurisdictions, *see* 28 U.S.C. §2263(a), which is not in issue in this case.

[2] There are certain other "triggering mechanisms" which commence the limitations period, e.g., newly discovered evidence, new rules of law, and the termination of state impediments to filing. *See* §2244(d)(1). These other initiating events are also not at issue in this case.

Prior Proceedings

Respondent entered a guilty plea to the charge of Robbery in the First Degree on June 6, 1992, in Queens County, New York Supreme Court. He was sentenced to a seven to fourteen-year indeterminate term of incarceration. He raised four claims on direct appeal to New York's intermediate appellate court: (1) a violation of *People v. Rosario*, 173 N.E.2d 881(N.Y.), *cert, denied*, 368 U.S. 866 (1961) arising from the prosecution's failure to turn over a witness' statement; (2) an abrogation of his Sixth Amendment right to counsel at a police-arranged lineup; (3) a due process violation as a result of a suggestive lineup; and (4) an argument that the imposed sentence was excessive. Respondent's conviction was affirmed on June 12, 1995. *People v. Walker*, 628 N.Y.S.2d 950 (N.Y. App. Div. 1995).(App. 30a-46a) The New York Court of Appeals dismissed Respondent's application for leave to appeal on January 15, 1996. *People v. Walker*, 664 N.E.2d 519 (N.Y.1996).(App. 95a-96a) Respondent did not seek a writ of certiorari. Therefore, his conviction became final on April 15, 1996.

While Respondent's application for leave to appeal was pending in the New York Court of Appeals, he sought a *writ of error coram nobis* from the Appellate Division. His *pro se* application alleged that he was denied the right to the effective assistance of appellate counsel due to counsel's failure to investigate the veracity of information given to law enforcement by a confidential informant and by the New York Legal Aid Society's withdrawal as counsel of record because it had previously represented the confidential informant. The application was denied on March 18, 1996. *People v. Walker*, 639 N.Y.S. 2d 932 (N.Y. App. Div. 1996).(App. 148a-149a)

On April 10, 1996, Respondent, *pro se*, filed a single document in the United Stated District Court for the Eastern

District of New York containing both a claim under 42 U.S.C. § 1983 and claims for federal habeas relief pursuant to 28 U.S.C. § 2254. On July 12, 1996, the federal district court dismissed Respondent's petition without prejudice. *Walker v. Legal Aid Society, et al.* No. 96 Civ. 2946, 1996 U.S. Dist. LEXIS 22492, at *4 (E.D.N.Y., July 12, 1996) (App. 20a) The court did so because it was "not apparent that Respondent had exhausted all of his state remedies.".

On May 22, 1997, Respondent, still *pro se*, and without having returned to state court, filed a federal petition for habeas corpus containing all exhausted claims. Applying the then prevailing law in the Second Circuit, *see Peterson v. Demskie*, 107 F.3d 92 (2d Cir. 1997) the district court dismissed Respondent's petition as untimely, holding that Respondent had failed to file in federal court within a "reasonable time" of AEDPA's April 24, 1996 enactment.[3] *Walker v. Artuz*, 1998 WL 355398 (E.D.N.Y., May 6, 1998).

The Second Circuit granted Respondent a Certificate of Appealability on December 1, 1998, appointed counsel and certified two questions for review: the first of which concerned whether Respondent's "first petition . . . tolled the period of limitations set forth in 28 U.S.C. § 2244(d)(2); the second question concerned whether equitable tolling was appropriate "where the prior, timely-filed section 2254

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[3] Respondent's conviction became "final" several weeks prior to the enactment of AEDPA. Initially, as noted above, the Second Circuit held that such petitioners had a "reasonable time" to file in federal court. Subsequently, however, the Second Circuit (and most other federal circuit courts of appeal), determined that individuals whose convictions were final prior to AEDPA's April 24, 1996 enactment, were entitled to a one year grace period. *See Ross v. Artuz*, 150 F.3d 97, 100-02 (2d Cir. 1998) *United States v. Flores*, 135 F.3d 1000, 1006 (5th Cir. 1998) *Calderon v. United States District Court*, 128 F.3d 1283, 1287 (9th Cir. 1998), *cert. denied*, 522 U.S. 1099 (1998) *United States v. Simmonds*,11 F.3d 737, 746 (10th Cir. 1997)

petition was dismissed without prejudice for failure to exhaust all claims . . ." (App. 21a-22a). On March 27, 2000, the Second Circuit Court of Appeals reversed the decision of the district court, holding that § 2244(d)(1)'s one-year statute of limitations was tolled while Respondent's mixed petition was pending in the district court.

Construing the statutory language, the Second Circuit court reasoned that the limitations period is tolled during the time a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. §2244 (d)(2) In the Second Circuit court's view, the plain meaning of the statute compelled a determination that a federal habeas petition is an application for "collateral review". 208 F.3d at 359. While the court stated that it is possible to interpret the word "State" in Section 2244(d)(2) to modify both "post-conviction" and "other collateral", it determined that "[c]lose analysis of the statute's language, however shows that 'State' modified only the word 'post-conviction', and the phrase 'other collateral' is to be given its naturally broader meaning." *Walker v. Artuz*, 208 F.3d 357, 359 (2d. Cir. 2000). The construction urged by the government was, in the Second Circuit court's view, "ungainly." *Id.* The panel stated:

> We choose to adopt an interpretation that gives full meaning to the phrase "State post-conviction review", which means federal habeas petitions. As the district court held in *Barrett*, "State post-conviction review" means all collateral review of a conviction provided by a state", and the phrase "other collateral review" would be meaningless if it did not refer to federal habeas petitions. *Barrett* 63 F. Supp. 2d, at 1250

Id. at 360. The court further held that its conclusion was consistent with the overall objective of the AEDPA "because the statute of limitations remains enforceable and intact. Our interpretation merely avoids penalizing state prisoners who

properly have filed federal habeas petitions and are awaiting a response from the court." *Id.* The court also stated that its interpretation of Section 2244(d)(2) would "reward petitioners for filing their federal petitions as soon as possible, thus promoting the statutory objective of efficiency in the review of state court judgments" and lead to "speedier completion of collateral review". *Id.* at 360-61. The *Walker* court rejected the position urged by the government on appeal, and again in this Court, as unfair. Citing *Kethley v. Berge,* 14 F. Supp 2d 1077, 1079 (E.D. Wis.1998) the Second Circuit Court of Appeals stated:

> In the Wisconsin case of *Kethley v. Berge*, the district court indeed held that "time is not tolled while an improperly filed federal habeas petition is gathering dust on district court shelves" pursuant to Section 2244(d)(2). *See Kethley v. Berge*, 14 F.Supp. 2d 1077, 1079 (E.D. Wis. 1998). However, the Wisconsin court also recognized the inequity resulting from its interpretation, stating that "the procedural dismissal of petitioner's action in the present case should not later be construed to produce the unintended effect of barring federal habeas review under the AEDPA statute of limitations provision." *Id.*

Id. at 361. Because the Second Circuit Court of Appeals decided that Respondent's federal petition tolled the limitations period, it "did not reach his alternative [equitable tolling] argument." *Id.*

The Second Circuit's holding was recently embraced by the Tenth Circuit Court of Appeals in its decision *Petrick v. Martin,* 263 F3d. 624, (10th Cir. 2001), WL8313, 2001 (10th Cir. [Okla.] Jan. 03, 2001) (No. 99-6399). However, the Third, Fifth and Ninth Circuits each have narrowly construed the statute to exclude federal habeas petitions from tolling the limitations period. *See, Jones v. Morton,* 195 F.3d 153 (3d

Cir. 1999); *Grooms v. Johnson*, 208 F.3d 489 (5th Cir. 1999); *Jimenez v. Rice*, 222 F.3d 1210 (9th Cir. 2000).

On November 13, 2000, this Court granted the government's application for a writ of certiorari to resolve the conflict among the circuit courts. 121 S.Ct. 480 (2000), 69 USLWW 3310 (No. 00-121).

SUMMARY OF ARGUMENT

The Second Circuit's holding in the case below, embraced by the Tenth Circuit in *Petrick v. Martin, supra.*, that the one-year statute of limitations established by 28 U.S.C. § 2244(d)(1) is tolled during the pendency of an application for federal habeas relief, is supported by the plain reading of the statute, the traditional canons of statutory construction, the concomitant principles of exhaustion and comity, and by the policy underlying the enactment of the AEDPA.

The basic rules of grammar and statutory construction require that phrases on opposite sides of the disjunctive "or" be given their separate meanings. Because the terms "post-conviction" review and "collateral review" are often used interchangeably by practitioners and courts alike, the phrase "other collateral review" has very little meaning if it does not include federal habeas petitions. The interpretation urged by the government would require this Court to rewrite the statute to include the word "State" immediately before the second part of the disjunctive, "other collateral review".

The government's contention that "other collateral review" refers only to those atypical proceedings that are not post-conviction in nature, such as mental health confinements, urges this Court to ignore the ordinary and customary meaning of the terms "post-conviction" and "collateral review". Those terms conventionally refer to habeas corpus or judicial orders issued after a conviction becomes final. Certainly, the phrase "other collateral review" is broad

enough to encompass such proceedings *and* federal habeas corpus petitions.

The statute of limitations was satisfied when Respondent filed his first petition for habeas relief within one year of his state court conviction becoming final. If the limitations clock continued to run during the period his petition was pending in federal district court, he would be penalized for complying with the statute. By encouraging state prisoners to file their applications for federal habeas relief within one-year of their convictions becoming final, the principles of comity and exhaustion are facilitated. Federal district courts are often helpful to habeas petitioners, the vast majority of whom are *pro se*, by advising whether a claim needs to be further addressed by the state courts.

The Second Circuit's holding comports with and furthers Congress' goals in the enactment of the AEDPA. Because state prisoners have no ability to influence whether or not their applications will be heard swiftly, the Second Circuit's ruling is the only fair interpretation of the statute. Congress did not intend to eliminate the right of federal habeas review to prisoners who file timely applications, even if they contain unexhausted claims.

Finally, the Second Circuit's holding does not encourage state prisoners to circumvent the statute of limitations by filing petitions that contain unexhausted claims. Section 2254(b)(2) enables a district court to deny a petition on the merits, even if it contains unexhausted claims. The real possibility that a state prisoner's petition may be dismissed on the merits, thus requiring that he seek leave to file a second or successive petition, is certainly not a risk most would take.

The judgment of the Second Circuit should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONSTRUED THE PLAIN LANGUAGE OF THE SECTION 2244(D)(2) TO INCLUDE PRIOR PETITIONS FOR WRITS OF HABEAS CORPUS.

The Second Circuit held that federal petitions for writs of habeas corpus are included in the phrase "State post-conviction or other collateral review". 28 U.S.C. § 2244(d)(2). By applying traditional canons of statutory construction, including both a natural reading and contextual analysis of the statute, the Second Circuit's ruling ensured Respondent's right to one full review of his constitutional claims by the federal courts. In so ruling, the Second Circuit remained faithful to the common law of habeas corpus and simultaneously furthered Congress' goals in enacting the AEDPA.

The Second Circuit held that the one-year limitations period was tolled during the time Respondent's unexhausted petition was pending in federal court. *Walker,* 208 F.3d at 361-62. The court so ruled by analyzing § 2244(d)(2), which states:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The panel construed the phrase, "[s]tate post-conviction or other collateral review" to include federal habeas petitions. 208 F.3d at 359-61. Thus, the court held that Respondent's unexhausted petition stopped the limitations clock. *Id.* A closer examination of the Second Circuit's decision in Respondent's case, as well as the Tenth Circuit's decision in *Petrick v. Martin,* 2001 WL 8313 (10th Cir., Jan. 3, 2001), agreeing with the Second Circuit, must result in an affirmance.

The Second Circuit held that the statutory limitations period was tolled during the pendency of a federal petition ultimately dismissed due to uncertainty about its exhaustion status. In the court's view, a federal petition was an "application for State post-conviction or other collateral review" satisfying Section 2244(d)(2)'s tolling requirement. In finding so, the court addressed the Third Circuit's conclusion to the contrary, in *Jones v. Morton*, 195 F.3d 153 (3rd Cir. 1999).

Jones held that the word "State" should be read to modify both "post-conviction" and "other collateral review", thus affording tolling "for various forms of state review only." 195 F.3d at 159. The Second Circuit acknowledged that "[i]t is possible to interpret 'State' in Section 2244(d)(2) to modify both 'post-conviction' and 'other collateral,'" 208 F.3d at 359, but concluded that "[c]lose analysis of the statute [sic] language, however, shows that 'State' modifies only the word 'post-conviction,' and the phrase 'other collateral' is to be given its naturally broader meaning." *Id.* In fact, in the panel's view, "applying 'State' to both of the disjunctive phrases would create a linguistic oddity because the statute would refer to 'a properly filed application for 'State post-conviction'. . . review or 'State . . . other review.' " *Id.* at 361. The Second Circuit Court of Appeals explained:

> "State other collateral review" is an ungainly construction that we do not believe Congress intended. If Congress had intended the meaning that the *Sperling* court imputed, it might more naturally have written "a properly filed application for State post-conviction or collateral review." We chose to adopt an interpretation that gives full meaning to the phrase "State post-conviction review," which includes all state remedies, and the phrase "other collateral review," which means federal habeas petitions.

208 F.3d at 360.[4]

The Tenth Circuit found the Second Circuit's opinion in this case "more persuasive" than the contrary decisions of several other courts, agreeing that "the language of the statute is best read as tolling the limitations period for 'State post-conviction review,' or 'other collateral review,' including federal habeas review." *Petrick*, 2001 WL 8313 at *3. The *Petrick* court also looked to the statute of limitations Congress enacted for capital cases in opt-in jurisdictions, 28 U.S.C. § 2263(b)(2), for confirmation of its parsing of the statutory language. There, the court noted, "Congress indicated that 'other collateral relief' included only state remedies." *Id.* at *3. Section 2263 (b)(2) was thus "some indication that Congress did not intend to limit 'other collateral review' in § 2244(d)(2) to state remedies." Id.[5]

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[4] The court also rejected the argument that "State post-conviction review" means judicial remedies, and "other collateral review" refers to non-judicial remedies such as clemency. *Id.* at 360. The panel correctly recognized that both post-conviction and collateral review "conventionally refer to habeas corpus, coram nobis and similar writs of judicial orders that courts issue." *Id.* The Tenth Circuit agreed, holding that "other collateral review" is "virtually meaningless if it is read to include only state remedies other than state post-conviction review." *Petrick*, 2001 WL at *3. According to the *Petrick* court, " 'State post-conviction review" is a broad term that can encompass all review a prisoner seeks after conviction and we see no reason to believe that Congress should have believed that there were other forms of state 'collateral review' that did not come within the scope of 'post-conviction review.' " *Id.*

[5] The Tenth Circuit also stated that its interpretation of § 2244(d)(2) was consistent with "the inapplicability of the successiveness rule to a federal petition filed after an initial federal petition is dismissed for failure to exhaust state remedies." *Id.* at *4; *See also, Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) As this Court explained, "[n]ot barring a second, post-conviction petition as successive would offer little solace to the petitioner whose second petition is dismissed because the

The panel in Respondent's case also concluded that its interpretation of § 2244(d)(2) was consistent with the purposes of the limitations period because it "will reward petitioners for filing their federal petitions as soon as possible, thus promoting the statutory objective of efficiency in the review of state criminal judgments." 208 F.3d at 36-61. The court also recognized the extreme unfairness of allowing the limitations period to run while an unexhausted petition was pending in federal court because, in many cases, the construction of § 2244(d)(2) urged by the government would "produce the unintended effect of barring federal habeas review." *Id.* at 361 (quoting *Kethley v. Berge*, 14 F.Supp. 2d 1077 (E.D. Wi 1998). The panel stated: "Our interpretation merely avoids penalizing state prisoners who have properly filed federal habeas petitions and are awaiting a response from the federal court." 208 F.3d at 361. Again, the Tenth Circuit agreed fully: "A contrary interpretation of § 2244(d)(2) would mean that a diligent prisoner who filed his federal petition the very day after his state conviction became final could still be permanently barred from habeas relief if the district court delayed before dismissing the petition for failure to exhaust." *Petrick*, *supra.*, 2001 WL 8313 at *4.

The Second and Tenth Circuits' reading of § 2244(d)(2) is fully supported by fundamental canons of statutory construction. Reading the phrase "other collateral" to include federal habeas proceedings gives the most sensible meaning to an arguably unclear piece of statutory language. Furthermore, this interpretation of the statutory language is powerfully bolstered by Congress' use of different and more pointed language in § 2263(b)(2) to restrict the availability of tolling to state court proceedings.

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limitations period ran while the first petition was pending in federal court." *Id.*

"We start, as always, with the language of the statute." *Williams v. Taylor*, 520 U.S. 420, 431 (2000); *see also United States v. James*, 478 U.S. 597, 604 (1986). Here, that language provides for tolling of the limitations period during the pendency of an application for "State post-conviction or other collateral review. . ." § 2244(d)(2). The phrase is divided down the center by the disjunctive "or", with "State post-conviction" on one side of the divide, and "other collateral review" on the other. A natural reading of the language yields the conclusion that the word "review" operates as the subject of both "State post-conviction" and "other collateral", such that § 2244(d)(2) as a whole refers to applications for both "State post-conviction review" and "other collateral review." [6]

The precise role played by the word "State" is less clear. As both the Second and Tenth Circuits acknowledged, "[i]t is *possible* to interpret the word 'State' . . . to modify both 'post-conviction' and 'other collateral.'" *Walker*, 208 F.3d at 359 (quoted approvingly in *Petrick*, *supra.*, 2001 WL 8313 at *3) (emphasis added). As both courts went on to conclude, however, that interpretation is, for several reasons, not the best alternative. As a practical matter, reading "State" to modify "other collateral review" does not produce a linguistically comfortable result, i.e., "application for State . . . other collateral review."

More importantly, the ordinary requirement that statutory "terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise," *Reiter v. Sonotone Corp., et al*, 442 U.S. 330, 338-339 (1979) (citing *FCC v. Pacifica Foundation*, 438 U.S. 726, 739-40 (1978)),

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[6] That the word "review" performs this function in § 2244(d)(2) is confirmed by the fact that neither "State post-conviction" nor "other collateral" convey any functional meaning in the absence of a subject, like "review".

is frustrated by reading "State" to modify "other collateral". This Court's own usage of the terms indicates that "post-conviction review" and "collateral review" can mean the same thing.[7] Thus, the only method by which to supply independent meaning to the phrases occupying opposite sides of § 2244(d)(2)'s disjunctive "or" is by use of distinguishing adjectives, "State" and "other". For these adjectives to actually give the requisite independent meaning to the terms "post-conviction review" and "collateral review", the meanings of the adjectives themselves must necessarily be distinct. "State" must mean exactly what is says, and "other" must refer to all forms of collateral review "other" than "State post-conviction review".[8] *See Petrick, supra.*, 2001 WL 8313 at *3 (agreeing with the Second Circuit "that 'other collateral review' is virtually meaningless if it is read to only include state remedies other than state post-conviction review"). Federal habeas corpus proceedings certainly fall within any sensible definition of "other" collateral review.

The government's contention that "other collateral review" refers strictly to the purportedly "wide variety of State 'collateral review' that is not 'State post-conviction' review", Pet. Br. 21, is wholly unpersuasive for two reasons. First, had this been Congress' intention, there would have been no need to include a reference to "post-conviction" review at all since,

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[7] *See, e.g. Williams*, 529 U.S. at 433 (prisoner "had not developed the facts of his claim in *state collateral proceedings*, an omission caused by the negligence of his state *post-conviction* counsel")(emphasis added); *Lewis v. Casey*, 518 U.S. 343, 377 (1996) (discussing previous decisions rejecting claims of constitutional entitlement to state-appointed counsel in "State collateral proceedings" and "state post-conviction proceedings").

[8] Ascribing these independent meanings to the adjectives "State" and "other" and in turn to the otherwise practically indistinguishable terms they describe, also avoids offending the well settled principle of statutory construction that the language of a statute "must be interpreted, if possible, to give each word some operative effect." *Walters v. Metro. Educ. Enter., Inc.*, 117 S.Ct. 660, 664 (1997).

by the government's own reading, " 'post-conviction' review is a subset of 'other collateral review.' " *Id.* The government's interpretation ignores the familiar maxim that the language of a statute "must be interpreted, if possible, to give each word some operative effect." *Walters, supra.* Second, the government's attribution to Congress of an intent to use "other collateral review" merely to refer to challenges to pre-trial detention or commitments to mental health institutions is at odds with the government's own articulation of Congress' purpose in enacting § 2244(d): "The statute of limitations enacted in AEDPA was written to balance twin goals of comity in tension [sic], i.e., to balance the goal of reducing delays to the finality of state *convictions* with the goal of ensuring full exhaustion of state court remedies." Pet. Br. 33 (emphasis added). Surely a legislature in pursuit of such well-defined, state conviction-oriented objectives would not take such an indirect approach to ensuring the availability of tolling during the types of relatively unusual non-post-conviction proceedings identified by the government. And even if Congress did have such proceedings in mind, it would be reasonable to assume that Congress would have chosen language less susceptible to an alternative interpretation than the phrase "other collateral review".

That Congress intended § 2244(d)(2)'s phrase "State post-conviction or other collateral review" to encompass federal habeas proceedings is confirmed by Congress' treatment of the question of tolling in § 2263(b)(2), which provides that "the time requirements established by subsection (a) shall be tolled *** from the date on which the first petition for post-conviction review or other collateral relief is filed until the final *State court* disposition of such petition[.]" Unlike § 2244(d)(2), the plain language of § 2263(b)(2) makes explicitly clear that tolling for "post-conviction review or other collateral relief" is unavailable at any point beyond "the final State court disposition" of a prisoner's challenge. As this Court observed in another decision concerning

inconsistency between Chapters 153 and 154 of the AEDPA, "[n]othing, indeed, but a different intent explains the different treatment." *Lindh v. Murphy*, 521 U.S. 320, 329 (1997). Simply put, had Congress desired to restrict tolling under § 2242(d)(2) to only the time during which *state* proceedings remain pending, it would have done so expressly, just as it did in § 2263(b)(2).[9] The fact that Congress did not do so is solid evidence of its intent *not* to impose any such restriction, but to instead, include federal habeas review, and any other "collateral review" within the class of proceedings by which §2244(d)(2)'s tolling mechanism is triggered.[10]

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[9] *See, e.g., Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (quoting *Russello v. United States*, 464 U.S. 16 (1983) (internal quotation marks omitted)(" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'"); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) ("Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did it expressly"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) ("When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly").

[10] The government contends that "[i]t defies logic to believe that Congress intended to allow for unexhausted federal habeas petitions to toll the limitations period in all cases *except* capital cases, where the consequences of constitutional error are of the highest potential order of gravity." Pet. Br. 27. While the government's sentiments with respect to the theoretical importance of heightened scrutiny in capital cases are appealing in the abstract, there can be no doubt that *reduction* of procedural safeguards in favor of increasing the pace of capital collateral litigation was precisely what Congress intended. *Compare* § 2244(d)(1) (imposing one-year limitations period for habeas corpus petitions generally) *with* § 2263(a) (imposing 180 day limitations period for death-sentenced prisoners); *see* §2266(b)(1)(A) (mandating entry of "final judgment on any application for a writ of habeas corpus brought . . . in a capital case not later than 180 days after the date on which the application is filed"); *see, e.g., Lindh v. Murphy*, 521 U.S. at 331 (describing the

II. THE LIMITATIONS PERIOD IS SATISFIED WHEN AN APPLICATION FOR A WRIT OF HABEAS CORPUS IS FILED WITH THE FEDERAL COURT.

Even if this Court finds that the canons of statutory construction do not support the Second Circuit Court of Appeals' ruling, the plain language of the first part of the statute, § 2244(d)(1), logically leads to the conclusion that Congress intended for the limitations clock to stop once the petition is filed in federal court. Common sense requires that this provision be read to mean that the statutory limitations period cannot run after its primary requirement—the filing of the habeas petition—is satisfied.

Section 2244(d)(1) reads, in relevant part, "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." By its plain terms, § 2244(d)(1)'s language establishes a single, unambiguous requirement for a state prisoner who intends to pursue his federal habeas corpus remedies: he must file an "application for a writ of habeas corpus" within one year of the relevant triggering event.[11] "Grace period" petitioners like Respondent were required to

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function of Chapter 154: "In general terms, applications will be expedited (for a State's benefit) when a State has made adequate provision for counsel to represent indigent habeas applicants at the State's expense"); *Green v. Johnson*, 116 F.3d 1115, 1119 (5th Cir. 1997) (AEDPA created "a new chapter 154 with special rules favorable to the state.")

[11] For prisoners like Walker, whose convictions "became final" prior to the AEDPA's April 24, 1996 effective date, a one year "grace period" applies, pursuant to which the limitations clock begins to run on the Act's effective date, but may be tolled by the same means available to other prisoners. *See, e.g., Ross v. Artuz*, 150 F.3d 97, 100-02 (2d Cir. 1998); *Wilcox v. Florida Department. of Corrections*, 158 F.3d 1209, 1210 (11th Cir. 1998) (*per curiam*); *Nichols v. Bowersox*, 172 F.3d 1068 (8th Cir. 1999) (*en banc*); *Rogers v. United States*, 180 F.3d 349, 355 (1st Cir. 1999).

file their petitions by April 24, 1997. The statute requires nothing more.

Respondent's April 10, 1996 petition clearly satisfied § 2244(d)(1)'s only requirement. While his petition was subsequently dismissed "without prejudice" due to questions about whether all claims were exhausted, *see Walker v. Artuz*, 208 F.3d 357, 358 (2d Cir. 2000), it was still undoubtedly an "application for a writ of habeas corpus". This Court has never suggested that a petition containing unexhausted claims is not an application for a writ of habeas corpus, or that such a petition is somehow jurisdictionally defective. *See, e.g., Granberry v. Greer*, 481 U.S. 129, 131 (1987) ("failure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application"); *Rose v. Lundy*, 455 U.S. 509, 513-514 (1982) (referring to "petition" containing "both exhausted and unexhausted claims"); *see also, e.g., Strickland v. Washington*, 466 U.S. 668, 684 (1984) ("exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional"). Rather, it has always been clearly understood that a mixed, or in this case, arguably mixed, petition is still an application for a writ of habeas corpus.

Likewise, the AEDPA contains no provision suggesting, or even implying, that a petition containing unexhausted claims either fails to constitute an application for habeas relief, or fails to confer jurisdiction on the federal court. On the contrary, § 2254(b), which contains the AEDPA's exhaustion requirement, clearly and specifically contemplates the filing of an "application for a writ of habeas corpus" containing unexhausted claims, and sets forth the alternatives available to a federal court faced with such a petition. *See* § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"); *see*

also § 2254(b)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State . . .").

In light of Congress' awareness that habeas petitions that do not satisfy § 2254(b)(1)'s total exhaustion rule are sometimes filed, and its decision to address that subcategory of petitions specifically through § 2254(b)(2), the absence of any express exception for unexhausted or mixed petitions anywhere in § 2244(d) is very significant. If Congress intended either to change the long-established understanding that a mixed petition is still a petition, or to ensure that the limitations period would run during the pendency of a mixed or arguably mixed petition, it would have made that intention clear. *See Thompson v. United States*, 246 U.S. 547, 551 (1918) ("we cannot doubt that if the Congress had intended . . . to change the law, as evidenced by the *Whitefield [v. United States*, 92 U.S. 165(1875)] decision, of which we must assume that it had full knowledge. . . it would have done so in plain terms, especially in a manner of such great importance as we have here. . ."); *cf., Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993) (presuming Congress' familiarity with decisions relating to statute under consideration).

Had Congress intended as the government contends, § 2244(d)(1) would have been drafted to say, "A 1 year period of limitations shall apply to an application for a writ of habeas corpus satisfying the total exhaustion rule . . . [or containing only exhausted claims]." The fact that Congress did not do so, especially after having taken specific action to address a closely related occurrence in § 2254(b)(2), is powerful evidence that Congress simply did not envision the limitations clock running during the pendency of a habeas

petition, exhausted or not.[12] Thus, regardless of whether all of the claims contained in Respondent's April 10, 1996 petition were exhausted, it was an "application for a writ of habeas corpus" which satisfied, and therefore stopped, § 2244(d)(1)'s limitations clock. Simply put, Respondent made it to federal court within one year of the relevant triggering event. The AEDPA does not require anything more. Once satisfied, the limitations period ceased to run while Respondent's case was pending in the district court.[13]

There are other compelling considerations which indicate that § 2244 (d)(1)'s limitations period is suspended during the pendency of a mixed application for habeas relief that is subsequently dismissed without prejudice. This Court has long recognized "the power of the federal courts to hold that "[a] statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *American Pipe*

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[12] *Cf. Gonzlon-Peretz v. United States, supra.*, quoting *Russello v. United States, supra; Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 305-306 (1993) (Thomas, J., dissenting, joined by Blackmun and O'Connor, JJ.) ("Courts should not treat legislative and administrative silence as a tacit license to accomplish what Congress and the SEC are unable or unwilling to do").

[13] Any doubt about the correctness of this understanding of §2244(d)(1) evaporates upon consideration of exactly how the limitations period would work under the government's theory. If the filing of an "application for a writ of habeas corpus" does not stop (or, in this case, prevent the start of) the limitations clock, then that clock would never stop. Instead, it would run until the conclusion of habeas proceedings regardless of the application's exhaustion status; or, if those proceedings continued for more than one year, until the expiration of the one year limitations period, at which time the otherwise proper (and once timely) habeas petition would become untimely and dismissal with prejudice would be required. This simply cannot be what Congress intended. *See, e.g., Sheridan v. United States*, 487 U.S. 392, 402 n.7 (1988) (courts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading.").

& Construction Co. v. Utah, 414 U.S. 538, 559 (1974); *see also id.*, at 558. ("In recognizing judicial power to toll statutes of limitation in federal courts we are not breaking new ground"). This power exists both where Congress has been silent on the question of tolling, as well as where "Congress has specified a precise limitations period, and further has provided for a tolling period in the event that [specified] litigation is instituted." *Id.* at 556.[14] As discussed more fully below, in the habeas context, a determination that the filing of a habeas petition subsequently dismissed without prejudice suspends the running of the limitations period is not only consistent with the "legislative purpose" underlying § 2244(d) and the rest of the AEDPA, it is essential to the orderly and fair administration of habeas corpus proceedings.[15]

Aside from the plain language and logical function of the limitations period described above, the most compelling reason for suspending the running of the limitations period during the pendency of an unexhausted or mixed petition is

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[14] Application of the rules embodied in *American Pipe* is particularly appropriate in a case like this one, where there exists "a substantial body of relevant procedural law to guide the decision to toll the limitations period, and significant underlying federal policy that would . . . conflict[] with a decision not to suspend the running of the statute." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975).

[15] This Court has addressed the issue of whether to toll a federal limitations period during the pendency of a procedurally defective pleading at least once before. In *Burnettt v. New York Central Railroad Co.*, 380 U.S. 424 (1965), which presented a question of timeliness under the limitations period governing actions under the Federal Employers' Liability Act (FELA), the Court held that "when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing party, and the state court action is dismissed because of improper venue, the FELA limitation is tolled during the pendency of the state action." *Id.* at 428. The logic which dictated the Court's resolution of the question presented in *Burnettt* applies with equal force here.

the perverse consequences that would flow from the failure to do so. Like limitations periods in other contexts, §2244(d) must be predictable, and capable of satisfaction by a person of common intelligence exercising ordinary diligence in attempting to comply with its requirements. *See, e.g., Wilson v. Garcia*, 471 U.S.261, 275 (1985); *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 150 (1987). However, permitting the limitations clock to run during the pendency of a habeas petition, filed in good faith but subsequently dismissed for non-exhaustion, introduces an unacceptable and unfair level of uncertainty. Under such a scheme, a petitioner could never be assured that his federal habeas petition was timely filed. Control over the timeliness of prisoners' petitions would be removed from the prisoners themselves and placed in the hands of overworked judges with no mandate to process petitions uniformly or expeditiously.

For example, two prisoners incarcerated in the same federal district, whose convictions became final on the same date, who both filed mixed (or arguably mixed) petitions containing identical claims, could receive very different treatment. One prisoner's petition could be assigned to a judge who reviews the application and dismisses it for failure to exhaust within thirty days of filing. That petitioner would have ample opportunity to return to state court and then pursue his federal remedies. If the other prisoner's application is assigned to an overburdened and understaffed judge, who takes thirteen months to review and dismiss his petition "without prejudice", he would be "out of time", although he did nothing wrong. Under the government's reading of §2244(d), he would be stripped of the opportunity to ever secure federal review of his conviction or sentence.[16]

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[16] A number of prisoners around the country have actually suffered this fate. *See, e.g. Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999) (petition rendered untimely when nearly ten month period during which mixed

It is simply no answer to place the onus on the prisoner to make certain his petition contains only exhausted claims, on penalty of possible forfeiture of his right to ever obtain federal habeas review. The requirements of exhaustion and fair presentation, as to both legal claims and factual allegations, frequently pose genuinely difficult questions which are debatable by knowledgeable attorneys and experienced judges. *See, e.g., Evici v. Commissioner of Corrections*, 226 F.3d 26, 28 (1st Cir. 2000) (vacating district court's dismissal for exhaustion, and remanding for further proceedings); *Morgan v. Bennett*, 204 F.3d 360, 369 (2nd Cir. 2000) (disagreeing with district court's conclusion that claim had not been adequately presented to state courts and remanding for merits consideration); *Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999) (vacating district court's denial of relief on merits and remanding for dismissal without prejudice to permit petitioner to exhaust available state remedies); *Bear v. Boone*, 173 F.3d 782 (10th Cir. 1999) (reversing district court's non-exhaustion ruling and remanding for merits review).

Frequently, habeas petitioners' representations that their claims are exhausted are challenged by the government, and reviewing courts, in the spirit of comity (which animated this

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petition lay dormant in district court was included in limitations calculation); *Pedraza v. State of Oklahoma*, 1999 WL 644814 at *1 (10th Cir. Aug. 25, 1999) (properly exhausted petition found time-barred as result of court's refusal to exclude from limitations period approximately eight months during which previous, unexhausted petition, remained pending in district court); *Harrison v. Galaza*, 1999 WL 58594 at *2 (N.D. Cal. Feb. 4, 1999) (dismissing petition as untimely after concluding that 338 days during which initial, unexhausted petition was pending in district court could not be excluded from limitations period); *Vincze v. Hickman*, 1999 WL 98330 (E.D.Cal. Jan.13, 1999) (dismissing petition as untimely after concluding that post-Act portion of more than two year period in which initial, unexhausted petition was pending in district court would not be excluded from limitations period).

Court's holding in *Rose),* often resolve these disputes in favor of dismissal without prejudice for failure to exhaust. *See, e.g. Snowden v. Singletary,* 135 F.3d 732, 737 (11th Cir. 1998), *cert. denied,* 119 S.Ct. 405 (1998) ("Federal courts may apply state rules about procedural bars to conclude that further attempts at exhaustion would be futile. This step should not be taken if there is a reasonable possibility that an exception to the procedural bar may still be available to the petitioner"); *Banks v. Horn, 126* F.3d 206 (3rd Cir. 1997) (dismissing for lack of exhaustion where possibility existed that procedurally barred claim could receive state court review under state law miscarriage of justice exception).

Moreover, the government's reading of § 2244(d) causes the once innocuous and prudential practice of erring on the side of dismissal "without prejudice" to become a trap in which hapless prisoners will unwittingly forfeit their right to federal review. Were this Court to ratify the government's view, the longstanding rule of *Rose v. Lundy, supra,* would be seriously jeopardized. In *Rose,* this Court observed that the "total exhaustion rule. . . *does not unreasonably impair the prisoner's right to relief . . .*" *Rose,* 455 U.S. at 522 (emphasis added). The acceptance of the government's view of § 2244(d), however, would in fact create a very real impairment of prisoners' rights to federal review. In cases presenting close questions of exhaustion, fair-minded federal judges would very likely begin resolving those questions, correctly or incorrectly, in favor of finding that the exhaustion requirement has been satisfied simply to avoid imposing this draconian fate on prisoners who have acted in good faith. This, of course, would severely undermine and devalue the comity interests at the core of the *Rose* dismissal requirement. *See Rose,* 455 U.S. at 518 (citation omitted). ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings").

Finally, consideration of how the government's interpretation of § 2244(d)(1) would work in practice leads to the obvious question of how a court of appeals' disagreement with a district court's finding of exhaustion would impact the standing of a prisoner's petition. There could be cases where, for example, the district court grants relief after finding that a prisoner's claim was exhausted, but the court of appeals, while agreeing with the district court's determination on the merits, vacates the exhaustion ruling after identifying some possibility that the prisoner might yet obtain merits review in state court. In all but the rarest of circumstances, the district court and the court of appeals proceedings will have occupied more than one year. If, as logic would dictate, the court of appeals' determination that the case should be returned to the state court has the effect of retroactively rendering the petition subject to dismissal since the day it was filed in the district court, the prisoner would be instantly and permanently out of time. And if the prisoner is thereafter unsuccessful in securing relief from the state courts, he will, as a result of the federal courts' inability to agree on a close question of exhaustion, be forever barred from obtaining the relief to which those same federal courts found him entitled. The unfairness of such a regime is obvious.

III. SUSPENDING THE RUNNING OF THE LIMITATIONS PERIOD DURING THE PENDENCY OF A PETITION SUBSEQUENTLY DISMISSED WITHOUT PREJUDICE IS CONSISTENT WITH THE PURPOSE OF §2244(D).

In support of its strained and unpersuasive construction of the statutory language, the government argues that suspending §2244(d)'s limitation period during the pendency of an unexhausted federal habeas petition will lead to repetitive, abusive filings by prisoners, without furthering the interests underlying the exhaustion requirement. *See* Pet. Br. 32-36. The government contends, for example, that "[i]f

. . . tolling were permitted for federal habeas petitions, then habeas petitioners would be encouraged to make federal court their first stop" because "there would be no practical incentive. . . for a petitioner to evaluate his or her claims for exhaustion prior to filing in federal court." Pet. Br. 34. The government also asserts that prisoners would file unexhausted federal petitions to "buy additional time prior to filing in state court." *Id.* In short, the government raises the spectre of federal courts being flooded with frivolous petitions.

But as this Court noted in *Slack v. McDaniel,* 120 S.Ct. 1595, 1606 (2000), States can enact legislation that prevent prisoners from repeatedly returning to courts for post-conviction review. Section 2254(b)(2) provides federal courts with a means to dismiss petitions with prejudice, even if they contain claims that have not been properly exhausted in the state courts. And the Federal Rules of Civil Procedure, applicable to habeas proceedings, provide the federal courts with alternative ways to stop vexatious petitioners.

Section § 2254(b)(2) of the AEDPA provides that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." Section 2254(b)(2) empowers the district court judges to deny petitions containing unexhausted claims on the merits, thereby subjecting any subsequent petition the prisoner may attempt to file, to the extremely rigorous second or successive application requirements contained in § 2244(b).[17] Clearly,

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[17] Section 2244(b) provides, in pertinent part:

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-

no prisoner with even the most rudimentary understanding of habeas procedure, would view the real possibility of a denial on the merits and its attendant second or successive petition consequences a risk worth taking merely "to buy additional time". Pet. Br. 34.[18]

Furthermore, contrary to the government's suggestion, suspending the running of the limitations period for the time a federal district court requires to determine that a petition contains unexhausted claims is entirely consistent with, and does further, the objectives embodied in the total exhaustion rule. As this Court necessarily concluded in *Rose*, dismissal of mixed petitions is a necessary tool for promoting full exhaustion of all claims. To avoid unwarranted unfairness, however, such dismissals must be accomplished in a manner that "does not unreasonably impair the prisoner's right to relief." *Rose*, 455 U.S. at 522. As discussed *supra* at 31-31,

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(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

[18] Moreover, as this Court has recognized, non-capital prisoners, who file the overwhelming majority of federal habeas petitions, have no incentive to delay the adjudication of their claims. *See, Rose*, 455 U.S. at 520 ("The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims"). In addition, no competent attorney representing a death-sentenced prisoner would risk denial on the merits pursuant to § 2254(b)(2) merely for the sake of suspending the limitations period.

subjecting prisoners who file in good faith to permanent loss of the right to seek habeas relief as a result of dispositional delays entirely beyond their control would clearly constitute an unreasonable impairment of access to habeas review, and would be fundamentally unfair. The more prudent course, especially in light of the discipline imposed by the threat of § 2254(b)(2), is to affirm the ruling of the Second Circuit Court of Appeals below, and suspend the running of the limitations period during the pendency of habeas petitions containing unexhausted claims.

Were this Court to determine that the limitations period is not suspended during the pendency of a federal petition for a writ of habeas corpus, basic fairness would require the establishment of procedures capable of safeguarding the rights of unwary prisoners. At minimum, it would be necessary to promulgate rules requiring federal district courts to expedite consideration of the exhaustion status of the petitions they receive, and to promptly dismiss those petitions that do not satisfy the total exhaustion rule. Additionally, a notification and election procedure would be necessary, whereby the district court would be required to inform a prisoner that his petition contains unexhausted claims, warn the prisoner of his limitations period status, and permit him to choose either to amend the petition to delete unexhausted claims, or to accept dismissal.[19] Proceeding without such

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[19] Several federal courts of appeal have recently adopted an analogous procedure to warn federal prisoners about the consequences of a district court's recharacterization of a post-trial pleading as a motion for relief pursuant to 28 U.S.C. § 2255, and to allow those prisoners to make an informed determination as how to proceed. *See, e.g. United States v. Evans*, 224 F.3d 670, 675 (2000) ("When a prisoner who has yet to file a motion under § 2255 invokes Rule 33 but presents issues substantively within §2255 Par.1, the district judge should alert the movant that his can preclude any later collateral proceedings and ask whether the prisoner wishes to withdraw the claim (or add any other arguments for collateral relief)"); *United States v. Miller*, 197 F.3d 644, 652 (3d Cir. 1999) ("upon

basic procedural safeguards would create a genuine, unacceptable risk of trapping large numbers of prisoners into unwittingly sacrificing their first and only opportunity for federal habeas review. Indeed, as this Court noted, in *Longchar v. Thomas,* 517 U.S. 314, 324 (1996), "Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denied the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty".

CONCLUSION

For the reasons set forth above, the Second Circuit Court of Appeals' ruling should be affirmed.

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receipt of pro se pleadings challenging an inmate's conviction or incarceration—whether styled as a § 2255 motion or not—a district court should issue a notice to the petitioner regarding the effect of his pleadings. This notice should advise the petitioner that he can (1)have his motion ruled upon as filed; (2) if his motion is not styled as a § 2255 motion have his motion recharacterized as a §2255 motion and heard as such, but lose his ability to file successive petitions absent certification by the court of appeals; or (3) withdraw the motion, and file one all-inclusive §2255 petition within the one-year statutory period"); *Adams v. United States,* 155 F.3d 582, 584 (2nd Cir. 1998) (*per curiam)* ("[D]istrict courts should not recharacterize a motion purportedly made under some other rule as a motion made under § 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be considered as made under § 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it so recharacterized").

Respectfully submitted,

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